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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK DAMON MYERS,

Defendant and Appellant.

B206153

(Los Angeles County
Super. Ct. No. NA061108)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Jaime L. Fuster, Deputy Attorney General, for Plaintiff and Respondent.

Mark Myers appeals from the judgment entered following a jury trial in which he was convicted of murder, three counts of home invasion robbery, attempting to dissuade a witness, and conspiracy to dissuade a witness. The jury also found true the special circumstance that the murder was committed during a robbery and further found that all counts except conspiracy were committed for the benefit of a criminal street gang and that a principal personally and intentionally discharged a firearm, causing death. Defendant contends (1) the special circumstance finding should be reversed based on failure to instruct on a required element and (2) the gang and weapons findings should be reversed based on improper admission of hearsay evidence and alternatively for ineffective assistance of counsel. We affirm.

BACKGROUND

Defendant, a member of the Eastside Longo criminal street gang, was a longtime acquaintance of murder victim Rudolpho Rodriguez and Rodriguez's girlfriend, Christina James, both of whom were methamphetamine users. Gregory Clark and Jo'el Bruce, with whom defendant was also acquainted, lived next door to defendant's grandmother in the City of Signal Hill. At one point defendant asked Clark if defendant could go into the methamphetamine dealing business with Clark. Clark declined.

On April 15, 2004, Rodriguez and James went to visit Clark and Bruce at their home. As Rodriguez and James approached the Clark-Bruce house, they saw defendant standing on the porch of his grandmother's house. Defendant told Rodriguez that he wanted to talk to him. Rodriguez agreed and the two talked for five to 10 minutes while James visited with Clark and Bruce. Rodriguez then joined James, Clark and Bruce inside the Clark-Bruce residence.

About five minutes later, defendant knocked on the door of the Clark-Bruce residence and was let in by Clark. Defendant was accompanied by two men, one of whom displayed a gun. Defendant told those in the room that they were being "taxed" and ordered them to hand over their valuables. Clark handed over his rings and about \$200 in cash. Three cell phones were taken from James's purse. Rodriguez asked defendant's two accomplices for their names. Defendant responded that Rodriguez

should not be concerned and that Rodriguez should remember that defendant was from Eastside Longo.

According to James, after the cell phones had been taken from her purse the accomplice who had the gun told James to take off her jewelry. Rodriguez then stood up, “said that they would have to shoot him now,” and hit defendant in the head. Defendant said, “Shoot him, just shoot him,” and the accomplice with the gun shot Rodriguez.

According to Clark, the accomplice with the gun pointed it at Rodriguez and told Rodriguez to empty his pockets. After doing so, Rodriguez said to defendant, “now you’re going to have to shoot me.’ And advanced on [defendant].” Rodriguez “threw the first punch” and the two struggled “somewhat.” Clark next saw a flash, heard a gunshot, and saw Rodriguez fall to the floor. Clark did not recall anyone saying, “Shoot him.”

Following the shooting, defendant and his accomplices fled. Rodriguez was taken to the hospital, where he died of a single gunshot wound to the torso. The fatal bullet was recovered from Rodriguez’s body. A spent bullet casing was found at the scene.

The next day, a Long Beach police officer attempted to effect a traffic stop of a car being driven by an Eastside Longo gang member. The car sped off and a chase ensued, which ended when the driver crashed his car into another vehicle. A search of the route taken during the chase revealed a handgun with scratches consistent with having been thrown onto the street from a moving car. Ballistics testing determined that the bullet with which Rodriguez was shot had been fired from that handgun.

James and Clark initially denied knowing who any of their assailants were but later identified defendant. At various points before trial, defendant contacted James and told her to say that he was not at the scene. Others threatened James with harm if she identified defendant. Following defendant’s arrest, defendant told an associate that there would be no case against him if James, Clark, and Bruce did not show up in court.

Gang expert Officer Abel Morales testified that Eastside Longo is an established Hispanic gang whose primary activities include murder, robbery, and drug sales.

“[W]hen a gang member comes to you and say[s], ‘You’re being taxed,’ you’re paying extortion money so that they can let you continue doing what you got to do, whether it

may be selling drugs or whatever it is that you do.” Eastside Longo benefits from controlling drug trade in Signal Hill and areas of Long Beach. One self-identified Eastside Longo gang member had previously been convicted of attempted murder and another had been convicted of assault with a firearm.

In defense, defendant’s grandmother testified that defendant has an identical twin brother.

DISCUSSION

1. Special Circumstance Instructions

Defendant contends that the trial court prejudicially erred in failing to instruct the jury on the elements of a robbery special circumstance when the defendant is not the actual killer. We agree there was error but conclude it was harmless.

Defendant was prosecuted as an aider and abettor of Rodriguez’s murder, and the jury made a true finding under Penal Code section 190.2, subdivision (a)(17) that Rodriguez was murdered while defendant was engaged in the commission of a robbery. (Further section references are to the Penal Code.) Under section 190.2, subdivision (c), a robbery special circumstance may be found against a defendant who is not the actual killer if the defendant, “with the intent to kill, aids, abets . . . or assists any actor in the commission of murder in the first degree.” Under section 190.2, subdivision (d), a robbery special circumstance may be found “[n]otwithstanding subdivision (c)” if a defendant who is not the actual killer “with reckless indifference to human life and as a major participant, aids, abets . . . or assists in the commission of a felony [such as robbery.]” (See *People v. Hodgson* (2003) 111 Cal.App.4th 566, 578–579.)

Pertinent to these requirements, CALJIC No. 8.80.1 provides in part: “If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether a defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, . . . or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, . . . or

assisted in the commission of the crime of [robbery] which resulted in the death of a human being”

Although the jury in this case was instructed under CALJIC on the elements of a robbery-murder special circumstance when the defendant is the actual killer, CALJIC No. 8.80.1 or its equivalent was not given. Defendant contends and the Attorney General aptly concedes error in failing to instruct on this element pertinent to the prosecution’s theory of the case. Accordingly, we must turn to the question of prejudice.

The Supreme Court has “‘consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* [(1967)] 386 U.S. 18, 24 []. [Citations.] Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (*Chapman, supra*, at p. 24 [].)’ [Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1187.)

Defendant asserts that the error here was prejudicial because, while James said that defendant directed the gunman to “shoot [Rodriguez],” Clark testified that the shot was fired while defendant and Rodriguez were struggling with each other and Clark did not hear anyone say that Rodriguez should be shot. Thus, continues defendant, James’s testimony regarding defendant’s express intent that Rodriguez be killed was undermined by Clark’s differing description of the event.

The Attorney General concedes a properly instructed jury would not necessarily have found that defendant acted with the specific intent to kill. Rather, the Attorney General focuses on the provision of section 190.2, subdivision (d) and CALJIC No. 8.80.1 that requires a special circumstance finding upon the determination that a defendant with reckless indifference to human life and as a major participant aided and abetted a felony such as robbery.

“[T]he culpable mental state of ‘reckless indifference to life’ is one in which the defendant ‘knowingly engag[es] in criminal activities known to carry a grave risk of death’ [citation]” (*People v. Estrada* (1995) 11 Cal.4th 568, 577.) “[R]eckless indifference to human life’ is commonly understood to mean that the defendant was

subjectively aware that his or her participation in the felony involved a grave risk of death. The common meaning of the term ‘indifference,’ referring to ‘the state of being indifferent,’ is that which is ‘regarded as being of no significant importance or value.’ [Citation.] To *regard* something, even to regard it as worthless, is to be aware of it. [Citation.] [¶] Although the term ‘reckless’—standing alone—may arguably be understood in common parlance to mean simply neglectful, heedless, or rash [citation], when the word is placed in context within the statutory phrase ‘indifference to human life,’ what is conveyed to the jury is more than mere negligence.” (*Ibid.*)

Regardless of the potential conflict in evidence regarding whether defendant told his accomplice to shoot Rodriguez, the evidence with respect to defendant’s culpability as a major participant in a robbery acting with reckless indifference to human life is clear. The record establishes Clark had refused to take defendant into Clark’s methamphetamine-dealing enterprise. On the day of the murder, defendant saw that his methamphetamine-using friend, Rodriguez, was about to visit Clark in the house next door and asked to talk to Rodriguez for a few minutes. After doing so, Rodriguez went into Clark’s residence. A few minutes later, defendant knocked on the door. When defendant was let in, he was in the company of two other men, one of whom was displaying a gun. The purpose of the three perpetrators was immediately apparent, as Clark and his guests were told by defendant that they would have to pay extortion money to continue their drug-dealing enterprise and that the money would be taken from the contents of their pockets, purses, and from their bodies in the form of jewelry.

The scenario of “taxing” a drug dealer and his friends by robbing them in the dealer’s home at the point of a gun carries a grave risk that the gun may be used and someone may die. As the mastermind of the robbery, defendant was certainly a major participant in the robbery who acted with reckless indifference to human life. Accordingly, we conclude that a properly instructed jury would have found true the

robbery special circumstance alleged against defendant. The failure to instruct under CALJIC No. 8.80.1 or its equivalent was therefore harmless beyond a reasonable doubt.¹

2. Gang and Weapons Findings

Under section 12022.53, subdivision (e)(1)(A), one of the elements of the firearm enhancement found against defendant was that he violated section 186.22, subdivision (b). One of the elements of the requisite gang finding and enhancement was that the defendant “actively participate[d] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity” (§ 186.22, subd. (a).) A “pattern of criminal activity” must include the commission of “two or more” enumerated offenses (such as robbery) within a requisite time period, “and the offenses were committed on separate occasions, or by two or more persons.” (§ 186.22, subd. (e).)

Defendant contends that the firearm and gang enhancements in this case were unsupported because the only evidence of a pattern of criminal activity was based on the inadmissible hearsay testimony of Officer Morales that the perpetrators of prior offenses had told him they were members of Eastside Longo, and this hearsay testimony violated defendant’s right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*). And if it is deemed that the issue has been forfeited for

¹ We further note that the prosecutor’s summation to the jury, which may be properly considered in assessing prejudice (see *People v. Prieto* (2003) 30 Cal.4th 226, 258; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111), accurately set forth the relevant legal requirements. In his summation, which was delivered before any of the instructions were read, the prosecutor explained that in order to find the special circumstance true the jury would have to find either that defendant told his accomplice to shoot Rodriguez or that defendant was a major participant in the robbery and acted with reckless indifference to human life. Conversely, the prosecutor continued, if the jury concluded that neither was true, the special circumstance should be found not true. Accordingly, the jury entered its deliberations with an accurate explanation of the requirements of the special circumstance finding the prosecutor was asking to be made.

failure to interpose a proper objection to this testimony, defendant alternatively contends that his trial counsel was constitutionally ineffective.

In *People v. Ramirez* (2007) 153 Cal.App.4th 1422 at page 1426, the defendant argued that hearsay testimony of a gang expert (coincidentally, Officer Morales) regarding predicate offenses to establish a pattern of criminal gang activity violated *Crawford*. The argument was rejected, the court concluding that “[h]earsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned. [Citation.]” (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427; see also *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208–1210.) Accordingly, there was no valid basis on which to object to the testimony about which defendant now complains, and his contentions of evidentiary error and ineffective counsel must be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

BAUER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.